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CITATIONS.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

UNITED STATES OF AMERICA, INTERSTATE Commerce Commission, Atchison, Topeka & Santa Fe Railway Company, Chicago, Rock Island & Pacific Railway Company, Denver & Rio Grande Railroad Company, Southern Pacific Company, Union Pacific Railroad Company, and Western Pacific Railroad Company, appellants,	No. 452.
v.	
MERCHANTS' AND MANUFACTURERS' TRAFFIC Association of Sacramento, Traffic Bureau of San Jose Chamber of Commerce, Stockton Traffic Bureau, and City of Santa Clara, appellees.	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

Appellees instituted this suit against appellants, in the District Court for the Northern District of California, to enjoin the enforcement of and

compliance with two orders of the Interstate Commerce Commission based upon " the long and short haul clause " (sec. 4) of the act to regulate commerce, as amended by the act of June 18, 1910 (c. 309, 36 Stat. 539, 547).

Upon the preliminary hearing, an interlocutory injunction was granted (R., p. 356; 231 Fed. 292), but subsequently set aside (R., p. 356). After final hearing, a decree was entered on March 27, 1916, granting a perpetual injunction (R., p. 370). Appellants promptly entered an appeal and applied for a stay of the final decree, which was granted by Mr. Justice McKenna on the 17th day of April, 1916. Motion to advance the hearing of the case was made and granted, and the case is now here for hearing upon the merits.

STATEMENT OF FACTS.

In 1910 the transcontinental railroads, including appellant railroads, filed with the Interstate Commerce Commission applications (Nos. 205, 342, 343, 344, 349, 350, 352) for relief from the provisions of the fourth section of the amended commerce act, asking for authority to continue all rates, shown on their tariffs, from the Atlantic seaboard and interior points to the Pacific coast terminals, lower than rates concurrently in effect from and to intermediate points. Acting upon these applications, the commission, following its report of June 22, 1911 (21 I. C. C. 329; R., p. 125), issued on July 31, 1911, fourth section order No. 124 (R., p. 116),

whereby zones were established and rates fixed from points within such zones to the Pacific coast terminal cities. This order of the commission was attacked, but upheld by this court in the *Intermountain Rate Cases* (234 U. S. 476). Subsequent to the decision in the *Intermountain Rate Cases,* the interested railroads filed with the Interstate Commerce Commission, in the original proceedings, a supplemental application (R., p. 235), asking, among other things, for certain changes in the boundaries of the zones and modification of the order with respect to certain tariff schedules, mentioning schedules B and C, the only ones relevant to this proceeding. After full and complete hearings and consideration of changed conditions arising out of the opening of the Panama Canal, the commission, on January 29, 1915, made an order (R., p. 323) upon these applications, by which the railroads were denied the full extent of the relief asked with respect to the 182 cities referred to as Pacific coast terminals, except as to San Diego, Wilmington, East Wilmington, San Pedro, San Francisco, and Oakland, Cal.; Portland, Oreg.; and Tacoma and Seattle, Wash., though some relief was granted. This action of the commission, however, was not final, but the railroads were requested to submit plans as to the best method for carrying out the policies outlined in the commission's report. The railroads submitted plans as requested, which were, after full hearing

and argument, taken under consideration by the commission, and resulted in the report (34 I. C. C. 13; R., p. 339) and order (R., p. 347) of the commission of April 30, 1915, which modified the order of January 29, 1915, in no respect relevant to the issues in this proceeding, since the cities represented by appellees are not included in either order as entitled to coast terminal rates.

All of the carriers, including appellant railroads, pursuant to the requirements of these two orders, filed and published tariffs thereunder. Appellees thereupon instituted this suit to enjoin the enforcement of and compliance with these orders. Pending this proceeding, but prior to the entering of the decree, the orders of the commission became effective, and the rates authorized thereby, which had been filed and published, became the only lawful rates that could be collected.

On March 27, 1916, after the rates authorized by the orders of the commission had become effective and freight was actually moving thereunder, the court below entered a final decree annulling the orders of the commission and enjoining the enforcement thereof and compliance therewith. The court further adjudged that the tariffs filed under said orders were " without due authority of law " and enjoined the collection of rates therein prescribed. By this decree lawful rates established by the railroads, with the consent of the commission, were set aside and no provision made for other rates which

could be lawfully collected . It is this decree which is now attacked.

Specification of Errors.

The assignments of error appear on pages 373 to 380 of the record. In substance they charge that the District Court erred: In holding the orders of the commission, dated January 29 and April 30, 1915, in so far as they affected appellees, and the tariffs filed pursuant thereto, were without authority of law; in cancelling and setting aside same and enjoining enforcement thereof or compliance therewith; and in entertaining jurisdiction in said suit.

ARGUMENT.

The sole ground upon which the court annulled the orders in question and enjoined enforcement of and compliance with same was that no sufficient application for the relief granted was filed by the carriers as provided in section 4 of the act. The court, in the majority opinion, thus states the proposition:

> The discussion of the questions involved in these proceedings has taken a wide range; but we are of the opinion that the only question we have to deal with in this case is the statutory power of the Interstate Commerce Commission. Had the commission, in the absence of an application by the carriers, the statutory power to make the order it did? Can the commission suspend the long-and-short-haul clause of section 4 of the act to regulate commerce without an application

> being made to it by the carriers for that purpose and a hearing upon that particular application as in a special case? We are of the opinion that this is beyond the statutory power of the commission; and such we understand to be the decision of the Supreme Court in *United States* v. *Louisville & Nashville Railroad,* 235 U. S. 314, 322. (231 Fed. 292, 300; R., p. 365.)

Judge Bledsoe, in the dissenting opinion, said:

> By the majority opinion such invalidity is made to rest upon the single fact that no "application" for the order had been made, and that, under the construction given to section 4 of the act to regulate commerce, as announced in 235 U. S. 314, 322, the making of such "application" is a necessary prerequisite to action on the part of the commission. I do not so construe the section and do not so read the decision. (231 Fed. 292, 300; R., p. 366.)

With respect to this ruling and the granting of the injunction, the Government maintains that—

I. Proper and sufficient applications were filed;

II. In the circumstances, applications, technically perfect, were not necessary;

III. The annulment of orders and granting of injunction were not justified upon other grounds.

I.

Proper and sufficient applications were filed.

Upon passage of the amendment to the long- and-short-haul clause (June 18, 1910, c. 309, 36 Stat. 539, 547) all existing rates charging more for a shorter than a longer haul over the same line or route in the same direction became unlawful unless authorized by the commission.

The amended section is as follows:

> SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this act; but this shall not be construed as authorizing any common carrier within the terms of this act to charge or receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may from

time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided further,* That no rates or charges lawfully existing at the time of the passage of this amendatory act shall be required to be changed by reason of the provisions of this section prior to the expiration of six months after the passage of this act, nor in any case where application shall have been filed before the commission, in accordance with the provisions of this section, until a determination of such application by the commission.

Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.

Appellant and other carriers in order to conform to the law filed their "applications for relief from the provisions of the fourth section of the amended commerce act."

These applications filed by the carriers were known as Nos. 205, 342, 343, 344, 349, 350, and 352 (R., p. 391 et seq.) and were the same applications upon which were based the order of the commission, known as fourth section order No. 124, upheld

by this court in the *Intermountain Rate Cases* (234 U. S. 476).

In the *Intermountain Rate Cases* Mr. Chief Justice White thus describes the applications:

> Following the form prescribed by the commission after the amendment in question, the seventeeen carriers who are appellees on this record made to the Interstate Commerce Commission their "application for relief from provisions of fourth section of amended commerce act in connection with the following tariffs." The tariffs annexed to the applications covered the whole territory from the Atlantic seaboard to the Pacific coast and the Gulf of Mexico, including all interior points and embracing practically the entire country, and the petition asked the Interstate Commerce Commission for authority to continue all rates shown on the tariffs from the Atlantic seaboard to the Pacific coast and from the Pacific coast to the Atlantic seaboard and to and from interior points lower than rates concurrently in effect from and to intermediate points. (*Intermountain Rate Cases,* 234 U. S. 476, 478.)

All were substantially the same. No. 205, copy of which appears in the appendix of this brief (p. 27), may be taken as typical.

Each application was entitled "Application for relief from provisions of fourth section of amended commerce act in connection with the following tariffs" and stated that "this application is based upon the desire of the interested carriers to con-

tinue the present method of making rates lower at the more distant points than at the intermediate points, such lower rates being necessary by reason of competition of various water carriers and of carriers partly by water and partly by rail operating from Atlantic seaboard ports to Pacific coast ports." (R., p. 392.)

In addition to these applications, the carriers, after the decision in the *Intermountain Rate Cases,* filed a supplemental application (Appendix B of this brief, p. 30; R., p. 235) asking for further relief from the long-and-short-haul clause.

The court below found that, with respect to appellees, these documents, styled "Application for relief from provisions of the fourth section of amended commerce act in connection with the following tariffs" were not such, but were "Applications to the Interstate Commerce Commission for authority to continue the then practice of making commodity rates to the Pacific coast lower than to intermediate, or Nevada, points." (R., p. 361.)

The majority opinion puts the question, "Can the commission suspend the long-and-short-haul clause of section 4 of the act to regulate commerce without an application being made to it by the carriers for that purpose?" (R., p. 365.) This they answered in the negative, and found that there was "no application on the part of the carriers to suspend the long-and-short-haul clause of section 4 with respect to these terminal points." (R.,

p. 361.) Upon this ground alone the decree was based.

Reduced to the forms of logic, the court's position seems to be expressed in the following syllogism:

All valid orders, the effect of which is to change terminals, are orders based solely upon an application therefor.

The commission's order, the effect of which is to change terminals, is not an order based solely upon an application therefor.

Therefore the commission's order is not a valid order.

The Government challenges the major premise.

The court, merely because it conceived the result to be the same, assumes that an order denying the continuance of existing equivalent rates to an inland and a coast city and requiring the establishment of different rates, is an order changing terminals; and also assumes, without warrant, that such an order was responsive only to an application to change terminals. The order, as will be shown, was one prescribing the extent of relief from the fourth section, and not one changing terminals—whatever the term may mean—though the incidental effect might be the same. An identical result might flow from valid orders based upon applications entirely unlike, as applications for relief from the fourth section, from discriminatory rates, for change of terminals, etc., and yet be equally responsive to each.

We proceed now to show the sufficiency of the applications and the responsiveness of the order thereto.

The amendment of June 18, 1910, affected a vast number of rates all over the United States and it became necessary, within a short time, for the commission to consider and approve or readjust all affected rates. The carriers, following the form prescribed by the commission, filed applications for relief, which covered all these rates. It was impracticable to conform to the law in any other manner than that adopted by the carriers.

They intended and the commission and this court understood that the applications filed were for relief from the the long-and-short-haul clause with respect to each particular locality, in relation to every other locality, mentioned in the attached tariffs, to the extent shown by the rates therein set forth. The railroads simply made their application by wholesale, suggesting the extent of relief desired, and the commission acted upon it in the same manner. These applications therefore should be considered and construed as if a separate application had been filed to cover each instance where relief was applicable.

For example, the application of the carrier to be permitted to charge the tariff rate of 75 cents on canned goods from New York to Sacramento (R., p. 300) and San Francisco (R., p. 300), respectively, while at the same time charging $1.10 for the lesser haul of the same commodity to Reno (R., p. 291),

in effect asked for relief from the fourth section clause and suggested the extent thereof. The commission upon such application therefore might very properly say, as it did in the order now contested, we will grant your request to charge less for the longer haul, but we, in view of our duty to " prescribe the extent to which such designated common carriers may be relieved from the operations " of the section, can not grant the extent of the relief asked for; you may put into effect the 75-cent rate to San Francisco (R., p. 35) but must increase your Sacramento rate to 85 cents (R., p. 35), because the rate you suggest is the same as that to San Francisco while the water competition is not the same. So we might go on through the whole list, considering each particular locality and rate mentioned in the tariffs attached to the application in their relation to every other locality and rate.

The commission had the power to grant the applications in part and to deny them in part (*Intermountain Rate Cases,* 234 U. S. 476, 479) and the evidence was ample to support its action. The record shows that the terminal rates previously enjoyed by Sacramento and the other inland cities were attributable to the competition of steamship lines, which absorbed the rail charges from the ports of call to these cities, and that their disallowance by the commission resulted from the discontinuance of these absorptions.

Respondent states, as shown in the record before it and as set out in its several reports

> hereinafter referred to and made exhibits to this answer, the reason which in the past induced the rail carriers to make terminal rates to these four cities was the fact that the ocean carriers between the east and west coasts of the United States, in order to secure tonnage for their ships, formerly absorbed the inland locals from the port of San Francisco. The passage of the Panama Canal act and the opening of the Panama Canal caused the ocean carriers to discontinue absorbing the local rail rates, for by doing so the ocean carriers would, by the provisions of the Panama Canal act, subject themselves to the jurisdiction of the Interstate Commerce Commission and of the act to regulate commerce. * * * The discontinuance of these absorptions changed the competitive conditions at San Jose, Sacramento, Santa Clara, and Stockton, which cities are not similarly situated as the terminal points named in the order. * * * (Answer of Interstate Commerce Commission, R., p. 74.)

Adopting a different view, the district court in effect held that: Since the difference in the extent of the relief granted operates to eliminate Sacramento and other cities " from Pacific coast terminals and their transfer to the newly created backhaul territory " (R., p. 363; 231 Fed. 292, 298), and since the carriers' application did not in so many words ask for such transfer, the order of the commission is not supported by the application filed, though the relief granted may be responsive thereto.

This is giving not only a highly technical and strained construction to pleadings in proceedings before the commission, which in fact should be liberally construed (*Interstate Commerce Commission* v. *Baird,* 194 U. S. 25, 44), but also, it is submitted, presents the fallacy of arbitrarily attributing a result that might flow from either of two causes, to one alone, illogically excluding the other.

We submit that the applications were sufficient and the orders complained of entirely responsive thereto.

II.

In the circumstances, applications technically perfect were not necessary.

Even if the applications were not sufficiently specific to constitute technical applications for relief from the fourth-section clause, still, in the circumstances, the orders contested would not be invalid.

The law only provides " That upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the commission to charge less for a longer than for a shorter distance for the transportation of passengers or property." It makes no provision for nor requires notice to anyone. No party but the carrier is necessary to the proceeding. Unless others voluntarily intervene it is strictly a proceeding between the carriers

and the commission, and the former are the only party entitled to take advantage of any technicality or formal insufficiency in the proceeding. The objection here urged for the first time, not by the carriers but by associations which allege they were not parties to the proceedings before the commission, is highly technical and does not affect the substance or justice of the result reached. It was, if sound, such as could be waived, and was waived by the carriers. Not only did they fail to object, but, on the contrary, accepted the order of the commission as entirely responsive to their application, proceeded to comply therewith by establishing rates in conformity thereto, and now in this proceeding, where third parties are attacking the validity of the order, join with the Government in seeking to uphold same.

As pointed out in the dissenting opinion of Judge Bledsoe, the substantial condition which Congress was insisting upon was not the filing of an application but the consent of the commission.

> Now the thing that Congress was insisting upon as a condition precedent to the creating of an exception to the general rule was not the making of an application by the carrier, but the granting of consent by the commission. It was the judgment of the commission, after investigation, that was to warrant the setting aside of the statutory rule, and the provision for the making of an " application " was intended merely as a means of securing such investigation and

> judgment. The making of an application by the carrier was of the form, perhaps, but not of the substance of the proceeding; it was a mere means to an end, and should not, in my judgment, be confounded with the end itself. The large purpose of the amendment to section 4 was to substitute the *judgment of the commission* for that of the carrier as to the necessity for a violation of the long and short haul clause of the commerce act. The amendment took " from the carriers the deposit of public power previously lodged in them and vested it in the commission as a primary instead of a reviewing function. (Intermountain Cases, 234 U. S. 476)." (231 Fed. 292, 301; R., p. 366.)

Furthermore, as held by Judge Bledsoe, if the application were insufficient to support the order, the filing of tariffs in conformity with the order should be construed to be an application of the carriers for the relief afforded by the commission's approval and allowance of the rates set out in the tariffs.

> Conceding, however, that the making of an application is a jurisdictional prerequisite to the charging of a higher rate for a shorter haul, the filing of the tariffs with the commission by the carriers involved, pursuant to the order of April 30, 1915, could in itself be reasonably construed as such application. (It appears from the record that such tariffs were filed, and being approved by the commission, have been officially promulgated.) (R., p. 368, 369.)

III.

The annulment of orders and granting of injunction were not justified upon other grounds.

Passing from the ground upon which the District Court relied, the Government maintains that the decree can not be supported upon the other grounds advanced by appellees.

These grounds may be reduced to three general propositions:

1. Appellees contended that they, though inland cities, had been designated " California terminals " by the carriers and had enjoyed the same rates as other so-called California terminals which were ports of call; that the commission's orders readjusting these rates, by requiring appellees to pay higher rates than the ports of call, were unjust and discriminatory and their enforcement should be enjoined.

It is sufficient answer to this proposition to say that the question of discrimination and justness of rates is one of fact for the determination of the commission, and its finding will not be reviewed by the courts, if supported by substantial evidence. This has been so frequently held by this court that the cases need only be cited without comment.

Los Angeles Switching case, 234 U. S. 294.
United States v. *Louisville & Nashville Railroad Co.,* 235 U. S. 314.
Atchison Railway Co. v. *United States,* 232 U. S. 199.

Texas & Pacific Railway Co. v. *Abilene Cotton Oil Company,* 204 U. S. 426.
Baltimore & Ohio R. R. Co. v. *Pitcairn Coal Co.,* 215 U. S. 481.
Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88.
Interstate Commerce Commission v. *Delaware, Lackawanna & Western R. R. Co.,* 220 U. S. 235.
Interstate Commerce Commission v. *Union Pacific R. R. Co.,* 222 U. S. 541.
Procter & Gamble Co. v. *United States,* 225 U. S. 282.
Intermountain Rate Cases, 234 U. S. 476.
Illinois Central R. R. Co. v. *Interstate Commerce Commission,* 206 U. S. 441.
Interstate Commerce Commission v. *Illinois Central R. R. Co.,* 215 U. S. 452.
Interstate Commerce Commission v. *Chicago & Alton R. R. Co.,* 215 U. S. 479.
Interstate Commerce Commission v. *Chicago, Rock Island & Pacific Ry. Co.,* 218 U. S. 88.

The evidence taken before the commission was not made a part of the record in this case, but the findings of fact in the reports of the commission, which in the circumstances must be accepted as true, show that there was ample evidence to support the commission's orders. Appellees' remedy, therefore, is by application to the commission under the provisions of section 13 of the act.

It should be further observed that the rates in question were prescribed in contemplation of the

carriers' applications for relief from the fourth section, and the question of discrimination was incidental. If discrimination resulted, relief must be sought, not by overturning the fourth-section orders in an attack upon them in the courts, but by their modification in a proper proceeding before the commission raising the particular question.

> That order is alone open to review. Whether other persons, cities or areas of territory have grounds of complaint, the way is open by application to the commission for inquiry and remedy. In that inquiry many elements may enter upon which the judgment of the commission should first pass, and of which the courts should not be called upon in advance to intimate an opinion. The reasons for this we have indicated, and they will be found at length in the cases which we have cited. (*Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Company,* 218 U. S. 88, 110.)

2. The second proposition of appellees is that the order of the commission deprived them of the equal protection of the law and prescribed confiscatory rates. This, they claim, results from the alleged fact that they had no notice of the proceedings before the commission and that no evidence was adduced in their behalf; and from the establishing of rates higher than formerly required of them and higher than the rates to ports of call.

The fourth section of the act refers only to carriers, and there is no provision requiring the serv-

ice of notice upon any person, association, or locality. The carrier and the commission are the only parties contemplated by the section, and it would be wholly impracticable to require service of notice upon all interested parties, for the interests involved would be coextensive with commerce itself. The pendency of the proceeding is itself notice to all interested.

But even if notice were required by the section, the form thereof is certainly not prescribed, and any notice of the pendency of the proceeding would be sufficient.

The cities of San Jose and Santa Clara had actual notice that the commission was considering the questions determined by the orders complained of. In the report of the commission in the proceedings known as "Investigation and Suspension Docket No. 405; Transcontinental Commodity Rates to San Jose, Santa Clara, and Marysville, California," and "No. 6717, *San Jose Chamber of Commerce* v. *Atchison, Topeka & Santa Fe Railway Company* et al." (32 I. C. C., 449, 457), wherein the cities of San Jose and Santa Clara were parties, the commission gave notice that "the matter of the extension of terminal commodity rates to interior California points is under consideration by the commission on carriers' fourth section applications Nos. 205, etc., and will be disposed of there."

Appellee, Merchants and Manufacturers Traffic Association of Sacramento, not only had notice of the proceedings before the Interstate Commerce

Commission, but by its counsel, G. J. Bradley, entered an appearance therein. (R., p. 276.)

As averred in the answer of the Interstate Commerce Commission, and nowhere contradicted, "G. J. Bradley, representing the cities of Sacramento and Stockton, appeared at said time and place [April 12, 1915, hearing room of the Interstate Commerce Commission, Washington, D. C.] and orally addressed this respondent in behalf of the cities of Sacramento and Stockton." (R., p. 78.)

It is seen, therefore, that, even if notice were required, the record shows that all appellees had notice and appeared in the proceedings before the commission, and "that at no time in any of said hearings did the petitioners (appellees), or any of them, ever make any objection to or complaint of any lack of notice or irregularity in the procedure thereof." (R., p. 78.)

It is difficult to find in the petition or elsewhere in the record any reasonable basis for appellees' claim that the commission's orders are confiscatory and "take from them property without due process of law." Three of the appellees are apparently voluntary associations and not legal entities capable of suing, while the fourth is a municipal corporation. They sue in a representative capacity, but do not allege the taking of particular property of definite persons. The allegations are too vague and indefinite to support the contention.

To establish their claim of confiscation they apparently rely upon the fact that they have been denied rates equivalent to those to ports of call and that rates on some commodities have been advanced. They raise no question as to the intrinsic reasonableness of the rates prescribed.

The question of whether or not a rate is confiscatory has reference to the carrier alone. Where a rate is intrinsically reasonable, there can be no such thing as a confiscatory rate relatively to the shipper. (*Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433.) Where a carrier affords a reasonable rate the shipper can not complain that he is denied the equal protection of the law or that his property is confiscated because another shipper or locality has secured a better rate. Such a situation presents a question of discrimination, which is, as we have seen, for the determination of the commission and not of the courts.

3. Appellees further contend that the orders of the commission were unauthorized because there were no such changed conditions as contemplated in the amended fourth section, the pertinent part of which is as follows:

> Whenever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points, it shall not be permitted to increase such rates unless after hearing by the Interstate Commerce Commis-